Rabiyah bte Malek v Foo Tak Siong (Ngoh See Cheng, third party)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 23–59–90
WAN YAHYA J
25 JANUARY 1994

Civil Procedure *— Judgment — Setting aside — Interlocutory judgment — Discretion of court — Rules of the High Court 1980 O 13 r 8 & O 16 r 5(1)(b)*

Civil Procedure *— Judgment — Setting aside — Interlocutory judgment — Substituted service — Third party notice served at third party's previous address — Whether service regular*

Civil Procedure *— Judgment — Setting aside — Interlocutory judgment — Prejudice — Whether could be compensated by costs*

The defendant had issued a third party notice against the third party and served it by way of substituted service at the third party's previous residence. Interlocutory judgment was obtained against the third party on 28 January 1991. The third party had applied, inter alia, for the interlocutory judgment to be set aside as he had had no knowledge of the proceedings against him until the hearing of the case on 25 February 1991 and, as such, he contended that the substituted service of the third party notice was irregular.

Held, allowing the application:

(1) The court may at any time set aside or vary a judgment entered under O 16 r 5(1)(b) of the Rules of the High Court 1980 on such terms as it thinks just. The principles applicable are the same as in setting aside judgments under O 13 r 8. Where the judgment is regular, the discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits or for some very sufficient reason.

(2) In the instance case, the court accepted the third party's explanation that service could not be affected on him because he had moved to another address and the delay in filing the present application was because the third party was, until the commencement, unaware of the proceedings.

(3) Although the third party had not put up his proposed statement of defence to indicate his defence on the merits, it was ostensible from the evidence of the plaintiff that the third party as a joint tortfeasor had a defence against the plaintiff's claim for damages and the defendant's claim for indemnity. It has always been the practice of the court not to deprive a person of his right to defend especially so in cases of judgment having been entered by default of appearance as a result of substituted service when it could not be shown that the third party was deliberately avoiding such

service. Moreover, the application coming at the stage when only part of the evidence of the plaintiff had been recorded would not prejudice the defendant's case. Any inconvenience or expenses incurred by the defendant could be suitably compensated by costs to be paid by the third party.

[Bahasa Malaysia summary

Defendan telah mengeluarkan suatu notis pihak ketiga terhadap pihak ketiga dan menyampaikannya melalui penyampaian ganti di kediaman pihak ketiga yang terdahulu. Penghakiman interlocutori telah dimasukkan terhadap pihak ketiga pada 28 Januari 1991. Pihak ketiga telah memohon, antara lain, supaya penghakiman interlocutori itu diketepikan kerana beliau tidak mengetahui tentang prosiding terhadapnya sehingga perbicaraan kes itu pada 25 Februari 1991 dan, dengan demikian, beliau menegaskan bahawa penyampaian ganti notis pihak ketiga itu adalah luar aturan.

Diputuskan, membenarkan permohonan itu:

(1) Mahkamah boleh pada bila-bila masa mengetepikan atau mengubah suatu penghakiman yang telah dimasukkan di bawah A 16 k 5(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 atas apa-apa terma yang difikirkannya adil. Prinsip yang terpakai adalah sama seperti mengetepikan penghakiman di bawah A 13 k 8. Di mana penghakiman itu mengikut aturan, budi bicara itu hanya akan digunakan jika afidavit yang menyokong permohonan untuk mengetepikan penghakiman itu mendedahkan fakta yang menunjukkan suatu pembelaan atas merit atau untuk suatu sebab yang sangat mencukupi.

(2) Di dalam kes ini, mahkamah menerima penjelasan pihak ketiga bahawa penyampaian tidak boleh dilakukan ke atasnya kerana beliau telah berpindah ke alamat lain dan kelengahan dalam memfailkan permohonan ini adalah disebabkan bahawa pihak ketiga itu tidak sedar akan prosiding ini sehingga ianya bermula.

(3) Walaupun pihak ketiga tidak memfailkan pernyataan pembelaan yang dicadangkannya untuk menandakan pembelaannya atas merit, adalah zahir dari keterangan plaintif bahawa pihak ketiga sebagai pelaku tort bersesama mempunyai pembelaan terhadap tuntutan plaintif untuk ganti rugi dan tuntutan defendan untuk tanggung rugi. Sudah menjadi amalan mahkamah supaya tidak melucutkan hak seseorang untuk membela dirinya terutamanya dalam kes di mana penghakiman telah dimasukkan melalui keingkaran kehadiran akibat penyampaian ganti bila ia tidak dapat ditunjukkan bahawa pihak ketiga itu sengaja mengelakkan penyampaian itu. Lebih-lebih lagi, permohonan ini yang datang pada peringkat di mana hanya sebahagian daripada keterangan plaintif telah dicatatkan, tidak akan memudaratkan kes defendan.

A Sebarang kesulitan atau perbelanjaan yang ditanggung oleh defendan boleh dipampas dengan kos yang dibayar oleh pihak ketiga.]

Notes

B For cases on setting aside judgments, see 2 *Mallal's Digest* (4th Ed) paras 1286–1340.

Cases referred to

1 *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 654 (refd)
2 *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'yat* [1979] 1 C MLJ 23 (folld)
3 *White v Weston* [1968] 2 QB 647; [1968] 2 All ER 842; [1968] 2 WLR 1459 (refd)
4 *Simpol bin Ahmad v Koh Bee Tin & Anor* [1978] 1 MLJ 10 (refd)

Christopher Foo (*Murphy & Dunbar*) for the plaintiff.
D *Harjeet Singh* (*Shearn Delamore & Co*) for the defendant.
Bachittar Singh (*Manjeet Singh & Associates*) for the third party.

Wan Yahya J: This is an application by the third party for the following orders, inter alia, that:

E (i) the third party be allowed leave to file the application out of time;
(ii) the interlocutory judgment obtained against him on 28 January 1991 be set aside and all further proceedings be stayed pending the outcome of the application; and
(iii) the third party be given seven days to file the memorandum of appearance F from the date of the order.

The summons-in-chambers filed on 8 April 1991 and supported by the affidavit of the third party, amongst other things, stated that the third party notice issued pursuant to the order of court dated 13 December 1990 was served on him by substituted service by the solicitors for the defendant at G his alleged premises at No 611, 3¾ mile, Jalan Ipoh, Kuala Lumpur, at which address he was not residing at the material time.

He averred that he had moved out of the above address around February 1971 and shifted to No 49, Jalan 42, Kepong Baru, Kuala Lumpur, and then in September 1982, moved to his present premises at No 623, Jalan H 48, Taman Kepong, Petaling, Kuala Lumpur.

He further averred that he had no knowledge of the third party proceedings against him until he attended the hearing of the case on 25 February 1991, and he did not evade service and as such he contended that the defendant's application for substituted service of the third party notice against him was irregular and ought to be set aside. Further, he being a layman, he was not I aware of the consequences of the interlocutory judgment taken against him till he was advised by his solicitors recently.

The defendant, in his affidavit-in-reply, stated that his solicitors obtained the address at which substituted service was effected from the RIMV, and also inserted the third party notice in the *Malay Mail* of 9 January 1991.

It is my understanding of the law that the court may at any time set aside or vary a judgment entered under O 16 r 5(1)(b) of the Rules of High Court 1980, on such terms (if any) as it thinks just. The principles applicable are the same as in setting aside judgments under O 13 r 8.

The classical case of *Evans v Bartlam*[1] sets out the principles on which the court should act, which was put aptly by Lord Atkin at p 480:

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

Where the judgment is regular, the discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits or for some very sufficient reason. I could do no better than to quote Raja Azlan Shah, Ag CJ (as his Majesty then was) in *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'yat*[2] at p 24A :

> The rule gives the court a discretion which must be exercised judiciously. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

A defence on the merits means merely raising only an arguable or triable issue, eg contributory negligence in a running down case, see *White v Weston*[3] (1 *Mallal's Supreme Court Practice* (2nd Ed) at p 85). The case of *Simpol bin Ahmad v Koh Bee Tin & Anor*,[4] decided by the Brunei High Court, could be of comparative value to the case in hand. In that case, the respondent applied for an order that interlocutory judgment entered in default of appearance and final judgment obtained be set aside on the ground that the interlocutory judgment obtained was a nullity or alternatively on the ground that it was irregularly obtained. The judge held that there was good reason for setting aside the judgment in that the statement of claim was admittedly in error in its description as to how the accident occurred.

In the instance case, I accept the explanation by the third party that service could not be affected on him because he had by then moved to another address and if there was any delay at all in filing the present application, it was because he was, until the commencement, unaware of these proceedings. Although the third party had not put up his proposed statement of defence to indicate his defence on merits, it is ostensible from the evidence of the plaintiff that the third party as a joint tortfeasor has a defence against the plaintiff's claim for damages and the defendant's claim for indemnity. It has always been the practice of the court not to deprive a person of his right to defend especially so in cases of judgment having been entered by default of appearance as a result of substituted service when it could not be shown that the third party was deliberately avoiding such

A service. Moreover I consider the application coming at this stage when only part of the evidence of the plaintiff has been recorded will not prejudice the defendant's case. Any inconvenience or expenses incurred by the defendant can be suitably compensated by the award of costs to be paid to him by the third party.

B I therefore make an order in term of prayers 1, 2 and 3 of the statement of claim and in addition, the third party is ordered to pay the cost of the application to the defendant, such payment to be agreed upon between the parties or failing which to be assessed by the SAR.

It is also ordered that further procedure in this case be conducted before another judge.

C *Application allowed.*

Reported by Anne Khoo

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